

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

PB 2005-002634

03/15/2010

JUDGE PRO TEM LINDSAY ELLIS

CLERK OF THE COURT  
R. Smith  
Deputy

IN THE MATTER OF THE GUARDIANSHIP  
OF:

MARIE JOHANNA LONG

JON D KITCHEL  
BRIAN J THEUT

AN ADULT.

MARGARET JEAN AULTMAN  
8780 E MCKELLIPS RD # 99  
SCOTTSDALE AZ 85257-4813  
BRENDA K CHURCH  
JEROME K ELWELL  
STACEY L JOHNSON  
DANIEL R RAYNAK  
KIM S RAYNAK  
9910 E CLINTON ST  
SCOTTSDALE AZ 85260  
R COREY HILL  
PATRICIA A GITRE  
GARY BRIAN STRICKLAND  
LAUREN L GARNER  
ROBERT GRASSO JR.

MINUTE ENTRY

UNDER ADVISEMENT RULING/FINDINGS OF FACT/ CONCLUSIONS  
OF LAW/ORDER

At issue in these contested guardianship and trust  
administration proceedings are petitions for the approval of

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fiduciary and attorneys' fees and costs that cumulatively exceed the value of remaining trust assets.<sup>1</sup> There are also civil lawsuits pending in state and federal court that relate to the underlying allegations in this matter.<sup>2</sup>

For purposes of these proceedings, the Court has had the opportunity to review the entire court docket, notes taken throughout the pendency of this matter, audio recordings of proceedings, partial transcripts of depositions and hearings, memoranda and pleadings submitted by the parties, the testimony and evidence adduced at hearing, and hereby finds and rules, as follows:

Parties

Marie Long ("Long") is the Trustor, protected person and ward. Genevieve Olen ("Olen") and Kim Raynak ("K. Raynak") are Long's nieces. Gary Olen ("G. Olen") is married to Genevieve Olen. Jeanette Churchill, Patricia Christiansen, Margaret Aultman and Madelon Cloute are Long's sisters. "Churchill", "Christiansen" and "Cloute" are self-identified as the "Interested Parties" and are the Plaintiffs in CV2009-017442. "Aultman" is Olen's mother. K. Raynak is the Plaintiff in 2:10-cv-00146-NVW.

Fiduciaries

In the Revocable Living Trust Agreement, executed by Clifford N. Long and Marie J. Long on September 12, 1996, Churchill and Christiansen were named as Successor Co-Trustees and remainder beneficiaries. After her husband's death, by the First Amendment to the Trust, executed by Long on March 16, 2004, Olen and her husband, G. Olen, were named as Successor

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<sup>1</sup> As evidenced by the extensive docket in this matter, numerous petitions and motions related to the removal and/or appointment of fiduciaries and attorneys have been filed since proceedings originally commenced in California and Arizona in 2005. These pleadings have been resolved by resignation or have been rendered moot by virtue of withdrawal however the issues raised in the appointment/removal requests mirror the objections to all fees' requests.

<sup>2</sup>

Complaint (Breach of Fiduciary Duty; Punitive Damages; Injunctive Relief) filed May 29, 2009 in Superior Court of Arizona, County of Maricopa in CV2009-017442 and Complaint (RICO, Civil Rights Violations, AZ Racketeering, Breach of Fiduciary Duty/Malpractice, APSA and Consumer Fraud) filed January 24, 2010 in US District Court, District of Arizona, in 2:10-cv-00146-NVW.

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Trustees and sole remainder beneficiaries of the Trust. This amendment removed Churchill and Christiansen as both Successor Co-Trustees and beneficiaries. Olen was also named by Long as her agent in the Special Power of Attorney and Health Care Power of Attorney, both executed on March 16, 2004.

The Sun Valley Group ("SVG") was appointed as Temporary Guardian on October 26, 2005 and as Permanent Guardian on January 19, 2006.<sup>3</sup> Peter and Heather Frenette ("Frenettes") are officers and directors of SVG. During the pendency of these proceedings, on May 26, 2006, Long removed Olen and G. Olen as remainder beneficiaries of the trust and designated her sisters as her remainder beneficiaries. Olen remained as Trustee. K. Raynak was appointed as Successor Guardian on December 17, 2009.

Attorneys

Olen retained Brenda Church ("Church") in 2005 to initiate Arizona guardianship proceedings and to represent Olen in her capacity as trustee. Church practiced law with the firm of Gammage & Burnham, PLC ("G&B") until October, 2008 when she moved to the firm of Frazer, Ryan, Goldberg & Arnold, LLP ("Frazer Ryan").

As the proceedings became more contentious in 2009, Olen retained the law firm of Hill & Hill, PLC ("Hill") to represent her in her capacity as trustee for the Long Trust. Jon D. Kitchel ("Kitchel") is Court Appointed Counsel for Long. Brian J. Theut ("Theut") is Long's Court Appointed Guardian Ad Litem. Linda S. Batts ("Batts") was Long's personal estate planning attorney and was initially nominated by Church to serve as Court Appointed Counsel. Lauren L. Garner ("Garner") represented SVG in its capacity as Long's Guardian. Jerome K. Elwell ("Elwell") was retained by SVG as litigation counsel in 2009.<sup>4</sup> Daniel Raynak ("Raynak") is the spouse of the Successor Guardian, K. Raynak, and represents Churchill, Christiansen and Cloute. Patricia A. Gitre ("Gitre") is Co-Counsel with Raynak for Churchill, Christiansen and Cloute.

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<sup>3</sup>SVG filed Notice of Resignation of Guardian on November 30, 2009 to become effective upon the appointment of a successor guardian.

<sup>4</sup>

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Stacey L. Johnson ("Johnson") represents the Arizona Department of Veterans Services and Gary Brian Strickland ("Strickland") represents the Maricopa County Public Fiduciary, agencies nominated by Raynak/Gitre/Kitchel as proposed successor guardians. In the California guardianship proceedings, Olen was represented by Edward C. Muns ("Muns") and Brierton Jones & Jones, LLP ("BJ&J"). Patricia Wood Elkerton ("Elkerton") served as Court Appointed Counsel in the California proceedings. The Successor Guardian, K. Raynak appears Pro Per in these proceedings.<sup>5</sup>

Pending Petitions

On July 31, 2008, Olen filed a Petition for Approval of Accounting of Trustee for the period of June 1, 2005 through April 30, 2008.<sup>6</sup> A Petition for Approval of Supplemental Accounting of Trustee was filed on January 9, 2009 for the period of May 1, 2008 through December 31, 2008.<sup>7</sup> On April 28, 2009, Olen filed an Addendum to Trustee's Accounting and Supplemental Financial Information that addressed additional trust assets omitted from the prior accountings.

On November 10, 2008, Olen filed a Petition for Approval of Trustee's Fees. An Addendum to the Petition for Approval of Trustee's Fees was filed on January 12, 2009. Requests for Guardian fees, caregiver fees and attorneys' fees are included in the accounting approval requests.

Churchill, Christiansen, Cloute and Kitchel filed their Objection to Petition for Approval for Accounting/Supplement to Accounting and Approval of Trustee's Fees on January 29, 2009. Theut filed his Objection to Petition for Approval of Accounting of Trustee; Objection to Petition for Approval of Supplemental Accounting of Trustee; and, Objection to Petition for Approval

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<sup>5</sup>Grant H. Goodman represents K. Raynak in the pending federal civil action.

<sup>6</sup>For purposes of this ruling, the Court is utilizing the ICIS Case Card Docketing Date as the filing date for pleadings.

<sup>7</sup>A Petition for Approval of Final Accounting of Trustee and for Discharge of Trustee was filed on January 15, 2010.

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of Trustee Fees and Addendum to Petition for Approval of Trustee Fees on January 29, 2009.

Also pending at the time of hearing were petitions to remove the trustee, guardian and guardian ad litem and to appoint successor trustee, guardian and guardian ad litem. The Court initially intended to conduct hearings on the removal/appointment petitions but as the issues were joined found it appropriate to proceed initially on the accounting and fees requests. Not only were the primary disputes financially based but the fiduciaries indicated their intention to resign upon a determination of the accounting and fees requests.

Prior to the resolution of the pending matters, Raynak, Gitre and Kitchel filed a Complaint with Long, Cloute, Churchill and Christiansen named as the Plaintiffs in CV2009-017442. This action was consolidated with the probate case because it involved the identical parties and issues as presented in the probate petitions. The Court dismissed Long as a named Plaintiff. A Motion to Dismiss is pending as to the remaining claims and parties.

The contested evidentiary hearing commenced on August 7, 2009 and continued on September 25, 2009, October 30, 2009, November 20, 2009 and December 1, 2009. The parties were directed to submit their proposed findings of fact, conclusions of law and/or written closing arguments by January 15, 2010.

As a result of the federal civil action filed by K. Raynak, a motion is pending to relieve Theut as GAL for Long.

Procedural and Factual Background

Long suffered a stroke in May of 2005 while residing at her residence in Scottsdale, Arizona. Due to Long's disability, Olen then succeeded her as Trustee. As the sole decision maker under the terms of Long's trust and estate planning documents, upon Long's release from rehabilitation, Olen elected to move her aunt to the San Diego, California area where Olen resided. Despite being estranged from her family in Arizona, this move to California triggered a vehement response from Long's relatives in Arizona. Easily subject to influence, a torrent of

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communications from family ensued that caused Long to reconsider the move to California. While understanding Long's desire to return to her home in Arizona, Olen became concerned that family members were motivated by financial interests and appeared unable to accept that Long was in need of protection and supervision. Similarly, Long's sisters in Arizona questioned Olen's motivations. This familial distrust has fueled the ensuing litigation that has resulted in the diminution of Long's trust estate.

Olen correctly believed that as the acting trustee and agent under Long's financial and health care powers of attorney, and as the remainder beneficiary of Long's trust estate, that she was solely responsible for determining what was in Long's best interests. However in an effort to clarify her responsibilities, and in response to her family's objections, Olen consulted with Batts and Church in Arizona and with Muns in California. All of the attorneys advised Olen to file guardianship proceedings due to Long's incapacitation and vulnerability. Olen compiled medical records and retained Dr. Dominick Addario ("Addario") to conduct a psychiatric evaluation. As Long and Olen resided in California, a California conservatorship of the person was initiated to safeguard Long's assets and her person. Despite objections from Long's family in Arizona, the California Superior Court appointed Olen as temporary conservator of the person on June 30, 2005.

Due to Long's desire to return to Arizona and at the recommendation of Elkerton, Long was returned by Raynak to Arizona where guardianship proceedings were commenced by Olen on September 8, 2005. Since that date, Olen has been represented by Arizona counsel. On September 27, 2005, Theut was appointed as Guardian Ad Litem for Long. Olen retained two experts for purposes of the Arizona proceedings, Dr. Pamela Willson ("Willson") and Dr. Bennett Blum ("Blum"). Addario was also proposed as an expert in the initial court filings. All medical experts concurred that Long was an incapacitated adult in need of protection.

As early as September 22, 2005, Raynak sought to appear as counsel for Long by filing pleadings on her behalf. Because Long

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was represented by both Kitchel and Theut in the Arizona proceedings, and due to Long's incapacitation, Raynak's appearance was disallowed by the court. Raynak had no standing as either an individual or as counsel to intervene in or object to the Arizona guardianship proceedings.

Although no formal Objections were filed to the Arizona guardianship proceedings, it became clear to the Court that Long's sisters and the Trustee differed as to the best interests of Long. The sisters objected to Olen continuing as Trustee despite her appointment by Long and Olen raised objections to the steep cost of the in-home care that would be required if Long was to return to her home. Ultimately, the Court concurred with counsel that the only reasonable way to safeguard Long's demonstrated needs was to appoint a neutral and independent third party to serve as guardian. Thus SVG, a private fiduciary certified and licensed by the Arizona Supreme Court, was appointed to act as temporary guardian on October 26, 2005. This appointment became permanent on January 19, 2006.<sup>8</sup>

Prior to the permanent appointment of SVG, the Court and counsel were advised of the recommendation by Olen and SVG that Long be considered for placement in an assisted living facility. In their report of Temporary Guardian, SVG estimated that in-home care would cost approximately \$11,500.00 per month as opposed to an average rate of \$3700.00 per month for assisted living services.

Olen, who remained responsible for Long's trust assets, alerted the Court to her concerns in a Trustee's Report and Request for Instruction filed on January 13, 2006 wherein she stated that "...if Marie is using her assets at a rate of \$200,000.00 per year to support her desire to reside in her own home, it is quite likely that Marie will run out of money and will not have sufficient assets to provide for her care for her entire lifetime."

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<sup>8</sup> SVG tendered their resignation as guardian effective upon the appointment of K. Raynak as successor guardian.

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Kitchel, Theut, Long and the sisters were adamant that Long be permitted to reside at her Scottsdale home. They questioned Olen's motivations because at the time this decision was made, Olen and her husband were the sole residual beneficiaries of the trust. The Court, counsel and all of the individuals involved in these proceedings were well aware of the enormous expense that would result from this placement decision.

SVG was appointed as permanent guardian with the understanding that that they would be responsible for overseeing the caregivers who were initially provided by Villa Home Care. Experienced in dealing with problematic families, SVG could not have anticipated the continuous complaints and objections that were lodged by Long's sisters and other family members. Caregivers were accused of all manner of inappropriate care including stealing, providing insufficient meals, improper supervision, sleeping, dangerous transportation, being rude, ruining Long's clothes, etc. These complaints caused Villa Home Care to refuse to provide full time in-home services for Long and resulted in SVG utilizing its own caregivers.

Arizona Care Management, a dba of SVG, assumed full time caregiver responsibilities for Long beginning in April 2006. This corresponded with an increase in Long's care needs due to health concerns. Long became more susceptible to falls so that care providers were required to serve on a 24 hour shift basis rather than supply the live-in care services that Villa provided. One key difference between the services provided was the ability of Villa Home Care personnel to sleep on a normal schedule as opposed to SVG staff that were required to remain awake and provide oversight and care to Long throughout the night. Occasionally individuals working for Villa Home Care would provide shift coverage for SVG staff after April 2006 if needed due to illness or vacation. The Court and counsel were aware of the changes made in the provision of care services to Long and the financial impact of such care.

Acceding to Long's wishes that she remain at home resulted in the substantial depletion of her trust assets. Because this choice was made in 2006 and the real estate market experienced a colossal crash, a secondary financial consequence was that the



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Long residence lost considerable value and, upon sale, the delay may have cost the trust about \$200,000.00.

The Long family, as represented by Raynak and Gitre and joined by Kitchel, has lodged numerous objections to the actions and performance of Olen as Trustee. These challenges relate generally to her financial management of the trust and her decision making as a fiduciary. Additionally, SVG has become a target of the family's antagonism as reflected in the numerous complaints and allegations of misconduct lodged by Raynak, Gitre and Kitchel. Unlike the normal probate case where disputes regarding attorneys' and fiduciary fees would be determined in either a negotiated settlement or after a day-long hearing, this matter has evolved into a venomous struggle by Raynak, Gitre and Kitchel to publicly diminish their opponents' reputations while forcing them to engage in excessive and costly litigation. None of the challenges to the attorneys' or fiduciary fees allege that the description of tasks performed, the date that services were performed or the time spent on tasks were fabricated or inaccurate. Rather the objections hinge upon allegations that the overall expenditures were unreasonable, improper and unauthorized. These objections relate to the actions of the Trustee Olen, the activities of the Guardian SVG and the performance of the GAL Theut.

Trustee's Fees and Approval of Trustee's Accounting

Olen assumed the responsibilities as Trustee upon her Aunt's disability and at her Aunt's direction in May 2005. At that time Olen and her husband were the sole beneficiaries of the Long Trust. Olen and Long had experienced a loving lifetime relationship and Olen was somewhat unprepared for the immediate decisions required by Long's stroke. She sought advice from Batts and communicated directly with Long's doctors, nurses, caseworkers and psychologist. Olen decided that moving Long to California was the appropriate decision and in Long's best interests once it became clear that Long would not be able to reside at her home again. Olen was financially stable and did not need financial assistance from Long to perform her duties as Trustee. She never utilized any trust assets for her own economic benefit. To the contrary Olen has been forced to defend herself in both state and federal court at great personal

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expense. The Court has no doubt that if Olen had understood the ramifications of assuming the duties of Trustee that she would have declined the appointment.

The challenges made to Olen's decision making can be divided into four general areas of concern: the initiation of guardianship proceedings in California, the retention of attorneys, fiduciaries and experts, investment decision making and payment of guardianship expenses.

California Proceedings

In the immediate aftermath of Long's stroke and resultant hospitalization, Olen became aware of monies being withdrawn from Long's bank accounts and that Long's sisters had removed \$10,300.00 from the home residence. Long spoke of transferring her home to "family members" and Olen became concerned that Long was unable to protect herself from financial exploitation.

Olen appropriately initiated the California action for the benefit and protection of Long because she believed that Long would remain in California. Such proceedings require the retention of medical experts, court appointed counsel, court investigator and counsel to assist the petitioner in initiating the action. The express language of the Long Trust gave Olen the right to retain an attorney and to pay that legal representative out of trust assets. Article IV(K) provides that Olen is authorized "(t)o commence or defend such litigation with respect to the trust or any property of the trust as the Trustee may deem advisable, at the expense of the trust..."

Retaining Church, Batts, Muns and BJ & J in California was necessary to address all of the issues presented by Long's unanticipated decline and the unexpected opposition by Long's family. Elkerton, as California court appointed counsel, was required by California law as a prerequisite to the protective proceedings. The fees paid for Batts (\$5,642.51), Muns (\$4,140.00), BJ&J (\$19,215.05) and Elkerton (\$3,615.00) were necessarily incurred by Olen for the benefit of Long and were reasonable, necessary and properly charged to the Long Trust.

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The objections lodged to the California guardianship action by Raynak, Gitre and Kitchel challenge the decisionmaking of the Trustee as it relates to filing the California action. They contend that the proceedings were unnecessary and that the Long Trust should not be charged with these fees and costs. Initially Raynak contested the proceedings on the basis that Long was not incapacitated. After the recommendation was made to transfer the case to Arizona, the Long family argued that all fees and costs were excessive and unnecessary.

The decisions made by Olen to commence proceedings in California and to retain experts to assist her in that process are judged by a reasonableness standard. When Long appointed her niece as successor trustee, she was aware that Olen had no background or training in the law, accounting or finance and had no experience with trust administration. She was aware that Olen resided in California. Olen was solely responsible to determine her Aunt's best interests. That she sought the assistance of experts to advise her shows the seriousness with which she assumed her responsibilities as Trustee. No other family member was charged with the authority to second guess Olen's decisions or conduct in this regard. The family members lack standing to contest the decision to initiate California guardianship proceedings and the reasonable costs of that action as determined by the Trustee. The Court finds that the initiation of California proceedings and the resultant expense was reasonable and necessary to protect the best interests of Long.

Retention of Arizona Counsel, Fiduciaries and Experts.

In addition to the express language of the Trust, A.R.S. §14-7233(C) (24) allows Olen as Trustee to retain counsel to advise and assist her even in the course of exercising her administrative responsibilities. Such authority makes logical sense particularly for a recently appointed trustee unaware of all of her duties. A trustee is authorized under Arizona law to defend actions, claims or proceedings for the protection of trust assets or for the protection of the trustee in the performance of her duties. (See A.R.S. §14-7233(C) (25) and A.R.S. §14-10816(24).)

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Central to the claims asserted in the removal petitions and objections to the accountings is the allegation that Olen's decisions resulted in the significant depletion of Trust assets. Raynak, Gitre and Kitchel contend that the losses suffered are evidence of misconduct and constitute a breach of Olen's fiduciary duty as Trustee. They cite the amount of attorneys' fees paid to Church as evidence that Olen failed to act in the best interests of Long. They do not contend that the time sheets were inaccurate or that the work was unperformed but that Olen somehow improperly incurred the fees. What Raynak, Gitre and Kitchel fail to recognize is that their litigious behavior and lack of compliance with probate rules and procedures created the evil against which they so loudly complained. The costs of these proceedings and the diminution of estate assets cannot be lodged solely against the Trustee and Guardian.

After Long returned to Arizona, guardianship proceedings had to be filed. Long remained incapacitated and Olen had to retain counsel for that purpose. Church represented Olen in initiating the Arizona proceedings and in providing advice to Olen in her capacity as Trustee. SVG was contacted to serve as the Arizona Guardian and Theut and Kitchel were appointed to represent Long.

At some point in early 2005, it became apparent that a level of hostility existed within the Long family against Olen. When Raynak sought unsuccessfully to become the attorney for his wife's Aunt, all prospects of an amicable resolution of any issue or dispute disappeared. What should have been a normal guardianship of a vulnerable adult morphed into hotly contested litigation. Raynak, Kitchel and the Long sisters unreasonably and continuously interfered with Olen and the performance of her duties. They undermined her relationship with Long and caused Long to amend her Trust to substitute the Long sisters for the Olen's as residual beneficiaries. The constant conflict required Church to intervene more frequently and higher attorney's fees resulted. The number of parties, attorneys and pleadings increased in direct proportion to the heightening hostility.

The Court is unaware of any sincere effort made by Raynak, Gitre and Kitchel to ameliorate the tension, to propose

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solutions, or to negotiate any resolution of the issues. To the contrary, Raynak, Gitre and Kitchel appear to have lost all objectivity. Their tactic of filing a civil state lawsuit against the Trustee and Guardian was unexpected and intimidating. The federal action that accuses Olen, SVG, the Frenettes, Elwell, Garner, Church and Theut with federal RICO claims, civil rights violations, racketeering, malpractice, financial exploitation and consumer fraud is staggering in its scope and impact. The only possible rationale for these actions is that Raynak, Gitre and Kitchel seek to refund the Long Trust with the anticipated proceeds of their pending lawsuits. Their crusade to vilify the fiduciaries and attorneys in this matter cannot be justified as necessary to protect Long. In fact, the decision by Raynak, Gitre and Kitchel to bring Long to observe the adversarial proceedings on August 7, 2009, revealed to the Court that Long's best interests were secondary to their aim of courtroom confrontation.

There can be no doubt that the fees and costs incurred by Olen exceed the norm. All of the fees were the direct result of performing her duties as Trustee in what can only be described as a family battlefield. Once she became a target of her family's rage, she was forced to rely more frequently on her attorneys for appropriate advice and direction. Once she became a defendant in the civil suit, litigation counsel also became necessary. She had no alternative but to defend her actions in this case. And she was legally authorized to retain competent counsel to assist her. The attorneys' fees and costs paid to Church (\$110,276.50) over four years of contentious guardianship and trust proceedings were compliant with Local Rule 5.7 and the Arizona Rules of Probate Procedure, Rule 33. They were all incurred for the benefit of Long, were reasonable, necessary and properly charged to the Trust as authorized by the express language of the Trust and Arizona law. The fees paid to Theut (\$16,609.83) as GAL and Kitchel (\$15,530.00) as Court Appointed Counsel were also reasonable, necessary and properly paid by the Trust. The Court approves the payments made by Olen for attorneys' fees.

Professional Services

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Olen retained accountants and other professionals to assist her in her duties as Trustee. Tax returns were prepared by Henry & Horne (\$2,157.00) and accountings were prepared by J. Collura Accountancy (\$9,550.00). T & T Estate Services (\$2,694.90) conducted periodic reviews and surveys of Long's residence and conducted an inventory of trust assets. Blum (\$9,100.00) evaluated Long's medical records and scans in anticipation of presenting expert testimony and was consulted by Olen to determine if Long was being subject to undue influence by her sisters and other family members. His retention was reasonable, necessary and in Long's best interests.

When Olen was originally appointed as Trustee, she did not keep contemporaneous records of the time she spent performing her duties and responsibilities as Trustee for Long. After the contested proceedings were initiated, she researched and reviewed her records and submitted a fees request totaling \$59,321.50 for work performed at the rate of \$35.00 dollars per hour through December 31, 2008.

No evidence has been presented that discounts her claims for work performed or hours spent on trust business. And no authority has been presented that would preclude Olen from compensation due to non-contemporaneous record keeping. Olen has never received any payment for her time spent in this capacity and payment now appears unlikely. Nonetheless the Court determines that Olen should be recognized for the work she undertook for her Aunt. To offset for any recordkeeping gaps or errors in computations, the Court finds that \$25.00 per hour is a fair and reasonable rate of compensation for Olen's fees as Trustee.

Investment Decision-making

Raynak, Gitre, Kitchel and Theut contend that Olen's investment decisionmaking caused unreasonable losses in the value of trust assets. They assert that this constituted a breach of fiduciary duty to Long and should preclude Olen from recovering any fees and costs.

Olen engaged the services of Kerry Downs, a qualified investment advisor, who also provided investment advice to

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Olen's family, to review Long's investments and to recommend changes based upon asset preservation and income generation. Olen communicated with Downs monthly and forwarded monthly statements to Kitchel on a regular basis. Although the investments selected by Downs -convertible securities- were less risky than Long's prior investment in common stock, the intervening market crash reduced the value of Long's investments by approximately \$30,000.00.

Olen was authorized by A.R.S. §14-10807 to delegate duties and powers to an agent. The delegation of investment decision-making is allowed by A.R.S. §14-10907. Olen properly delegated trust investments to Downs. She communicated the trust's investment goals and monitored the account upon receipt of statements. Regrettably the Long trust suffered not only from the 2008 market decline but also from the ever increasing need to fund Long's living expenses from the sale of securities.

Olen acted reasonably in her management of trust assets. At the request of Kitchel and Theut she also took steps to investigate whether or not any viable claims could be asserted against Downs. The Court finds that Olen is not responsible for the trust investment losses that resulted from the market crash. The Trustee acted reasonably and did not breach any duties related to her investment decisionmaking. No trust losses shall be charged against the Trustee in her individual capacity.

Guardian and Care Fees

After the appointment of SVG as Long's Guardian, Olen became responsible for the payment of guardian and care fees from the trust bank account. Due to Olen's residency in California, SVG coordinated a small petty cash fund for Long and assisted in needed repairs and maintenance of the Long residence. No conservatorship was established so SVG was not involved in handling Long's funds or financial obligations.

After Villa ceased providing care for Long, SVG utilized their own caregiver services to provide full day in-home shift care for Long. SVG received \$234,597.27 for 24 hour in-home shift care for nineteen and one half months. Consistent with

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their original estimate presented to the Court, the average cost per month was approximately \$12,000.00.

SVG experienced the same difficulties with the Long family as those described by Villa and Olen. The complaints included objections to the costs and manner of Long's transportation, cost of lunches, cost of Suns tickets, costs of errands for Long, costs of companions accompanying Long to events, the level of services provided to Long, the quality of meals and care, the cost of caregivers consulting with SVG staff and attorneys, etc. As conflicts increased so too did the cost of guardian and attorneys' fees.

Raynak, Gitre and Kitchel contend that SVG engaged in some sort of self-serving behavior by providing their own caregivers to Long. They contend that using employees hired and paid by SVG constituted a breach of fiduciary duty to Long and that such an action requires prior court approval. They seek a Court order denying SVG's fees so as to refund to the trust any monies received.

No evidence was presented to the Court to establish that the fees and costs incurred by SVG were either unreasonable or inappropriate. Admittedly, time was charged for mundane activities such as lunch outings, obtaining directions, telephone calls, recreation, running errands, and other day-to-day activities. However it is precisely these activities that determine the quality of life for a frail elder unable to orchestrate the details of daily living. SVG agreed to act as guardian for Long with a full recognition of the responsibilities involved. They provided Long with the level of care and medical management that is required by a certified fiduciary and they did so in a professional, compassionate and thoughtful manner.

At no time in these proceedings has an allegation been raised or any complaints lodged regarding the provision of care to Long by SVG. There are no legitimate disputes about SVG or its performance of its duties as Guardian for Long. The fiduciary fees and costs (\$129,318.60) and the attorneys' fees for Garner (\$21,664.11) are reflective of the micromanagement



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required of a guardian when dealing with a problematic family. The fact that Raynak and Gitre lacked any experience or knowledge of probate law also unreasonably expanded and delayed these proceedings. These fees and costs are approved in their entirety as being reasonable, necessary and incurred for the benefit of the ward.

The time calculations and the work performed by SVG including care services were carefully detailed on all billings submitted to the Trustee. Olen reviewed all of SVG's, Villa's and ACM's invoices before payment. After review and correction the invoices were paid. Kitchel and Theut periodically received the trust account statements and were aware of the steep cost for in-home care. They were also consulted regarding the utilization of SVG caregivers after Villa refused to continue as a full-time care provider. The rates charged by SVG were consistent with the fees of other certified fiduciaries in the county.

The Court finds that the election by SVG to provide its own caregivers was proper and reasonable. In the context of this case, it provided the additional benefit of ensuring the background, education and appropriateness of the individuals who would be charged with Long's daily care. Supervision and training would be the direct responsibility of SVG so that the care giving services were enhanced by direct involvement of SVG staff. No court approval of caregivers is necessary when the initial appointment of a certified fiduciary requires the provision of such services.

From the initiation of the Arizona guardianship proceedings in 2005, the Court knew that the person or entity appointed would be responsible for providing in-home care for Long. The costs and complexities of that decision mandated the selection of a certified fiduciary that possessed the background, knowledge, experience and reputation to undertake a difficult task. SVG was recommended and assumed the guardianship role with the Court's full confidence. The Court regrets that the efforts of Raynak, Gitre and Kitchel to discredit SVG could cause this certified fiduciary to decline future court appointments when

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its expertise is most needed. The Court finds that the fees and costs incurred by SVG are approved in their entirety.

Unresolved Petitions and Pleadings

Four issues remain unresolved in these consolidated probate and civil proceedings. They involve the status of Theut as GAL, the final approval of the Trustee's accounting and request for fees, the pending civil complaint and the retirement of the assigned judicial officer.

Withdrawal of Guardian Ad Litem Theut

On February 16, 2010, Theut filed an Amended Motion for Leave of Withdrawal. Attached to the motion was an e-mail drafted by Raynak on December 23, 2009 to 66 recipients and a recent Arizona Republic column. This e-mail was intended to solicit negative comments regarding Theut and Church to be made to the Maricopa County Presiding Judge Barbara Mundell, the Presiding Probate Judge, Karen O'Conner, a newspaper columnist, Laurie Roberts, James Logan, Office of Public Defense Services and the Arizona Supreme Court Fiduciary Board. The e-mail was addressed to individuals unconnected with the proceedings and was an outrageous attempt to denigrate the reputation of Theut who is widely regarded by the court and legal community as a dedicated and skilled probate practitioner. The Court is unaware of the response, if any, to this solicitation for unsubstantiated gossip. This e-mail is indicative of the manner in which Raynak conducted himself in this case. Rather than present facts in court to support his contentions, Raynak bullied, belittled and disparaged his opponents. Particularly reprehensible was Raynak's large-fonted closing to this electronic communication that stated, "FINALLY, PLEASE DO NOT REFERENCE MY NAME SPECIFICALLY IN ANY EMAIL YOU SEND. SIMPLY SEND AN EMAIL, ONE TO ALL WOULD SUFFICE, IF YOU ARE AS OUTRAGED AS I AM ABOUT THIS SITUATION. I WOULD ALSO ASK YOU TO SEND THIS EMAIL TO OTHERS SO THAT THEY CAN DO THE SAME."

This e-mail predated the federal lawsuit filed by K. Raynak that named Theut as a Defendant. Obviously Theut would be unable to continue representing the best interests of Long when Long's current Guardian and the Guardian's husband are seeking to undercut Theut's professional standing. The Court discharges

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Theut as GAL due to this actual conflict of interest and extends to Theut its appreciation for his tireless advocacy for Marie Long. The Court declines to appoint a substitute Guardian Ad Litem.

Trustee's Final Accounting

On January 15, 2010, Olen filed a Petition for Approval of Final Accounting of Trustee and for Discharge of Trustee and a Petition for Approval of Trustee's Fees. Because these petitions are contested, under the Rules of Probate Procedure, a hearing is routinely scheduled. The Court finds that a hearing is not required for several reasons. All of the objections to these petitions are identical to the issues raised in the prior contested petitions for approval of fees and costs. These objections were the subject of pleadings and hearings considered by the Court over a five year time period. It would be unreasonable to require counsel and the parties to repeat their responses and positions to a successor judicial officer unfamiliar with the facts.

The fees incurred by Church for the time period of December 1, 2008 through September 30, 2009 are the direct consequence of the unreasonably aggressive litigation waged by Raynak, Gitre and Kitchel. Because of the pending state civil action, Church was placed in the untenable position of having no option but to respond to the extraordinary volume of pleadings and to appear at numerous contentious hearings.

This is not the type of case where a party can walk away from litigation without taking the risk of huge financial and professional repercussions. Church and Olen like Theut and SVG were the objects of hateful and unsubstantiated attacks by Raynak, Gitre and Kitchel. The level of enmity is best reflected in the preposterous allegations lodged in the federal lawsuit. This Court is not only well aware of the duplicative and redundant pleadings filed by Raynak, Gitre and Kitchel but also experienced the excessive court time involved in resolving what should have been the subject of a routine evidentiary hearing. To allow another year to be expended duplicating the hearings of 2009 would be contrary to the interests of justice and judicial economy and would unduly burden Olen, Church, and SVG.

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An additional consideration for deciding this issue without a hearing is that the Trustee's good faith defense of a judicial dispute regarding the administration of a trust is expressly authorized by the language of A.R.S. §14-11004. Any attorneys' fees and costs incurred are properly charged to the Trust. In this case, with the exception of a \$1625.00 balance, the Trust has already paid the attorneys' fees and costs for Church and all work performed was described in detail in the attached affidavits. Raynak, Gitre and Kitchel's objections to all of the items set forth in the accounting does not obviate the legal authority of the Trustee to retain competent counsel in contested trust administration proceedings. The Court finds that the attorneys' fees and costs were reasonable, necessary and appropriate trust expenditures.

As to the Trustee's Fees, the Court finds that Olen is entitled to compensation pursuant to the express language of the trust and according to Arizona law. The Trustee recognizes that that there are currently no trust assets from which payment could be made but has requested court approval due to the pending litigation. All Trustee's fees are hereby approved with the reduction of the hourly rate to \$25.00.

Consolidated Civil Action: CV2009-017442

The Defendant SVG filed its Motion to Dismiss Count 6 of Plaintiff's Complaint on October 9, 2009. This request has been held in abeyance pending a resolution of the outstanding probate petitions. A Response to Motion to Dismiss and Request for Leave to Amend Complaint was filed by Raynak and Gitre on November 27, 2009. Defendant SVG thereafter filed their Reply in Support of its Motion to Dismiss on December 16, 2009.

This Court already dismissed Long as a Plaintiff in the civil action because she lacked legal capacity to sue and Kitchel as Court Appointed Counsel lacked authority to sue on her behalf. Thus the remaining claims alleged by Cloute, Churchill and Christiansen assert that SVG violated its fiduciary duty to the Plaintiffs because they were remainder trust beneficiaries. To prevail on a claim of breach of fiduciary duty, a Plaintiff must first prove the existence of a

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fiduciary duty, a breach of that duty and causally related damages.

In this matter, Cloute, Churchill and Christiansen have failed to present any facts to substantiate a fiduciary relationship between them and SVG. Although SVG was Long's Guardian and was paid with trust assets, no confidential relationship existed between the Plaintiffs and SVG. Nor is any claim presented regarding damages or economic harm caused to the Plaintiffs personally. As remainder trust beneficiaries, they contend that using Long's assets to pay SVG caused the depletion of Long's assets. No authority is presented that would impose a legal duty on a court appointed guardian to remainder beneficiaries of a ward's revocable trust. The Plaintiffs are unable to allege any facts to support a breach of fiduciary duty claim by Plaintiffs against SVG. Because no amendment to the Complaint could cure this legal deficiency, it is ordered granting the SVG's motion to dismiss Count Six of the Complaint.

Judicial Retirement

The parties are aware of the reassignment of this matter due to the retirement of this judicial officer on January 15, 2010. As a result, the parties are directed to forward any future pleadings to the Hon. David O. Cunanan, Old Court Building, 125 West Washington, Phoenix AZ 85003 (602-506-3381.)